

# 11-3440

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United States Court of Appeals  
for the Third Circuit

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,

*Intervenor,*

v.

NEW VISTA NURSING AND REHABILITATION,

*Respondent.*

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ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

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**SUPPLEMENTAL APPENDIX FOR NEW VISTA  
NURSING AND REHABILITATION**

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MORRIS TUCHMAN, ESQ.  
*Attorney for Respondent*  
134 Lexington Avenue, 2nd Floor  
New York, New York 10016  
(212) 213-8899  
*morris@tuchman.us*

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**SA 1**

**Motion of the National Labor Relations Board for Limited Remand of the  
Administrative Record, dated December 2, 2015 [SA1-SA7]**

Case: 11-3440 Document: 003112144322 Page: 1 Date Filed: 12/02/2015

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
and	)	Nos. 11-3440
	)	12-1027
1199 SEIU UNITED HEALTHCARE WORKERS	)	12-1936
EAST, N.J. REGION	)	
	)	
Intervenor	)	
	)	Board Case:
v.	)	22-CA-29988
	)	
NEW VISTA NURSING AND REHABILITATION	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD  
FOR LIMITED REMAND OF THE ADMINISTRATIVE RECORD**

To the Honorable, the Judges of the United States  
Court of Appeals for the Third Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully moves that the Court remand the administrative record in this case to the Board for 30 days. The Board requests this limited remand so that it can consider and rule on three motions for reconsideration that were ruled on by Board panels that included invalidly appointed Board members and that have not yet been addressed by a properly constituted Board panel. Based

## SA2

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on questions propounded by the Court in anticipation of oral argument, the Board believes that a limited remand would conserve judicial resources and expedite resolution of this case. In support of this motion, the Board shows as follows:

1. The case is before the Court on the Board's application for enforcement of its decision and order issued on August 26, 2011, against New Vista Nursing and Rehabilitation, LLC ("the Company"). In its decision, the Board (Chairman Liebman and Members Becker and Hayes) found that the Company had unlawfully refused to bargain with, and provide information to, its employees' collective-bargaining representative. 357 NLRB No. 69.

After that decision issued, the Company filed with the Board a motion for reconsideration of the August 26 Order. On December 30, 2011, the Board (Members Becker and Hayes, Chairman Pearce recused) denied the Company's motion. Thereafter, the Company filed three additional motions for reconsideration. On March 15 and March 27, 2012, the Board (Members Hayes, Griffin, and Block) denied those motions. Members Griffin and Block were serving pursuant to January 2012 recess appointments.

2. On May 16, 2013, the Court issued a decision vacating the Board's August 26, 2011 Decision and Order, finding that there was no quorum for its issuance because a member of the panel that issued that decision—Member

**SA 3**

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Becker—was invalidly appointed. 719 F.3d 203 (May 16, 2013). The Board filed a petition for rehearing.

While the Board’s rehearing petition was pending, the Supreme Court issued *NLRB v. Noel Canning*, 134 S. Ct. 2550 (Jun. 26, 2014), holding that the President’s January 4, 2012 appointments of Members Block and Griffin to the Board were not authorized by the Recess Appointments Clause of the Constitution. This Court thereafter granted panel rehearing and directed the parties to “rebrief this matter in its entirety.”

3. Just before its brief was due, the Company filed a motion asking the Court to vacate and remand the Board’s 2012 reconsideration decisions issued by panels that included Board members whose appointments were invalidated by *Noel Canning*. The Company also requested remand of the administrative record filed in 2012, and a stay of appellate proceedings pending the resolution of the remanded post-decisional matters by a properly constituted Board panel. The Board opposed the Company’s motion on the ground that a remand was unnecessary. The Court did not rule on the Company’s motion, and ordered the parties to proceed with briefing, which was completed in December 2014.

4. The Court has now scheduled the case for oral argument on December 10, 2015. On November 19, 2015, the Court issued a letter directing the parties to

## SA 4

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be prepared to address three specific questions at argument. All three questions implicate the Board's actions in 2012, when it undisputedly lacked a quorum.

5. The Board maintains, as stated in its brief at pp. 53-55, that the Court may fully determine the propriety of the Order without adverting to the 2012 orders on reconsideration. Nevertheless, the Board recognizes that the Court's questions signify that the Court has ongoing concerns regarding the 2012 orders issued by panels that included two invalidly appointed members. Accordingly, in order to conserve the Court's and the parties' resources, and to permit expeditious resolution of the unfair-labor-practice issues that are the ultimate object of this case, the Board proposes a limited remand of the administrative record to the Board for 30 days. The proposed remand would allow the current Board, which now has four Senate-confirmed members, to consider and rule on the motions for reconsideration that were denied by improperly constituted Board panels in 2012. At the conclusion of the 30-day period, the Board would either re-submit the administrative record to the Court so that the Court could resume its consideration of this case, or inform the Court why the filing of the record would be inappropriate.

WHEREFORE, the Board respectfully requests that the Court remand the administrative record to the Board for a period of 30 days, for the limited purpose

**SA 5**

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of addressing the Company's last three motions for reconsideration (dated January 3, March 14, and March 22, 2012).

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 2nd day of December 2015

**SA 6**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
and	)	Nos. 11-3440
	)	12-1027
1199 SEIU UNITED HEALTHCARE WORKERS	)	12-1936
EAST, N.J. REGION	)	
	)	
Intervenor	)	
	)	Board Case:
v.	)	22-CA-29988
	)	
NEW VISTA NURSING AND REHABILITATION	)	
	)	
Respondent/Cross-Petitioner	)	
_____	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 2, 2015, I electronically filed the foregoing Motion of the National Labor Relations Board with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, and sent to the Clerk of Court, by first-class mail, the required number of paper copies.

I certify that the foregoing Opposition was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below.



**SA7**

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Louis J. Capozzi, Jr.  
Capozzi & Associates  
2933 North Front Street  
Harrisburg, PA 17110

Morris Tuchman  
134 Lexington Avenue  
Second Floor  
New York, NY 10016

William S. Massey  
Gladstein, Reif & Meginniss  
817 Broadway  
6th Floor  
New York, NY 10003

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 2nd day of December 2015

**SA 8**

**Answer to Motion by the NLRB for Remand of this Matter, filed December 2, 2015  
[SA8-SA9]**

Case: 11-3440 Document: 003112144670 Page: 1 Date Filed: 12/02/2015

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

Petitioner

and

1199 SEIU UNITED HEALTHCARE WORKERS, NJ REGION

NOS. 11-3440  
et al

Intervenor

V

NEW VISTA NURSING AND REHABILITATION

Respondent

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ANSWER TO MOTION BY THE NLRB FOR REMAND OF THIS MATTER

1) New Vista Nursing and Rehabilitation (“New Vista”) joins in the motion of the NLRB to remand this matter. It contends, however, that the Court should remand the matter for disposition by the Board but should not do so for only the requested 30 day period.

2) There is no assurance that the board will rule on the *three* motions for reconsideration within 30 days. Indeed, the August motion alone was decided only at the end of December. Moreover, New Vista will likely seek the recusal of Member Hirozawa, a partner in the law firm representing the intervenor in this matter. Member Hirozawa’s recusal, along with Member Pearce’s already having recused himself in this matter, could pose an issue of whether a valid quorum could decide the motions. The result could be repeated motions for extensions of the 30 days requested which will take up the Courts’, and the parties’, resources.

**SA 9**

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3) Because of the forgoing, the Court should, it is respectfully submitted, remand to the Board the disposition of the three motions, but it should not limit the remand to the Board to a 30 day period. If the Court desires, of course, it can hold this case until there is a proper disposition of the motions for reconsideration. This is clearly authorized by section 10(e) of the National Labor Relations Act.

WHEREFORE, New Vista respectfully requests that the motion to remand this matter should be granted but without a 30 day limitation period.

/S/ \_\_\_\_\_

MORRIS TUCHMAN

**SA 10**

**Reply of the National Labor Relations Board to New Vista's Response to Motion  
for Limited Remand of the Administrative Record, dated December 3, 2015 [SA10-  
SA11]**

Case: 11-3440 Document: 003112144940 Page: 1 Date Filed: 12/03/2015

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD		)	
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Petitioner/Cross-Respondent		)	
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and		)	Nos. 11-3440
		)	12-1027
1199 SEIU UNITED HEALTHCARE WORKERS		)	12-1936
EAST, N.J. REGION		)	
		)	
Intervenor		)	
		)	
v.		)	Board Case:
		)	22-CA-29988
		)	
NEW VISTA NURSING AND REHABILITATION		)	
		)	
Respondent/Cross-Petitioner		)	
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**REPLY OF THE NATIONAL LABOR RELATIONS BOARD TO  
NEW VISTA'S RESPONSE TO MOTION FOR LIMITED REMAND OF  
THE ADMINISTRATIVE RECORD**

To the Honorable, the Judges of the United States  
Court of Appeals for the Third Circuit:

New Vista Nursing and Rehabilitation ("New Vista") joins in the motion of the National Labor Relations Board ("the Board") to remand this matter, but objects to the Board's request that the remand be limited to 30 days, suggesting that the issues are too complex to be resolved in that short period.

In reply, the Board reaffirms its prior representation to the Court that the issues can be resolved within 30 days. The Board further states that its

**SA 11**

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representation is not affected by New Vista's statement that it will likely seek the  
recusal of Member Hirozawa on the grounds that he was formerly a partner in the  
law firm representing the intervenor in this matter.

/s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 3rd day of December 2015

**SA 12**

**Order of the Hon. D. Brooks Smith, dated December 4, 2015 [SA12-SA13]**

Case: 11-3440 Document: 003112146137 Page: 1 Date Filed: 12/04/2015

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT  
December 2, 2015

No. 11-3440

NATIONAL LABOR RELATIONS BOARD,  
Petitioner

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,  
Intervenor

v.

NEW VISTA NURSING AND REHABILITATION,  
Respondent

Nos. 12-1027 & 12-1936

NEW VISTA NURSING AND REHABILITATION, LLC,  
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,  
Intervenor

(NLRB: 22-CA-29988)

Present: SMITH, GREENAWAY, Jr. and VAN ANTWERPEN, Circuit Judges

1. Motion by Petitioner/Cross Respondent NLRB Request the Court Remand the Administrative Record to the Board for a Period of 30 Days, for Limited Purpose of addressing the Company's last three motions for Reconsideration dated January 3, March 14 and March 22, 2012;
2. Response by Respondent/Cross Petitioner New Vista Nursing and Rehabilitation to Motion to Remand;

**SA 13**

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Page 2 (Continued)

3. Reply by Petitioner/Cross Respondent NLRB to New Vista's Response to Motion for Limited Remand of the Administrative Record.

Respectfully,  
Clerk/pdb

ORDER

The foregoing Motion is GRANTED IN PART. The motion is GRANTED with respect to the request for remand. The motion is DENIED with respect to the 30 day limitation. Having granted the motion to remand, the oral argument scheduled for Thursday December 10, 2015 at 10:00 A.M. need not be conducted. Per section 10(e) of the National Labor Relations Act, this Court will retain jurisdiction over this matter.

By the Court,

s/ D. Brooks Smith  
Circuit Judge

Dated: December 4, 2015  
PDB/cc: All Counsel of Record



*Marcia M. Waldron*

Marcia M. Waldron, Clerk

**SA 14**

**Order Denying Motions for Reconsideration, dated December 17, 2015 [SA14-SA18]**

Case: 11-3440 Document: 003112169956 Page: 3 Date Filed: 01/04/2016  
**EXHIBIT A**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NEW VISTA NURSING AND  
REHABILITATION, LLC**

**and**

**Case 22-CA-029988**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NJ REGION**

**ORDER DENYING MOTIONS FOR RECONSIDERATION**

On August 26, 2011, the Board issued a Decision and Order in this proceeding granting the Acting General Counsel's Motion for Summary Judgment and, inter alia, ordering the Respondent, on request, to bargain with 1199 SEIU United Healthcare Workers East, NJ Region as the certified collective bargaining representative of its unit employees. 357 NLRB No. 69.

On September 9, 2011, the Respondent filed a motion for reconsideration of the Board's August 26 Decision and Order. The Respondent advanced two arguments in support of its motion. First, the Respondent asserted that because the above-referenced Decision and Order was postmarked August 31, 2011, the decision issued after then-Chairman Wilma B. Liebman's departure from the Board on August 27, 2011, and is therefore void as ultra vires. Second, the Respondent argued that the Board erred in failing to order a hearing on its contentions that it changed the duties of unit employees after the Regional Director issued his Decision and Direction of Election finding that those employees are not supervisors, and that those changes establish that the employees currently possess supervisory authority and the unit is now inappropriate.



## SA 15

On December 30, 2011, the Board issued an Order rejecting the Respondent's motion for reconsideration.<sup>1</sup> With regard to the date the underlying decision was issued, the Board explained that the date of the decision reflected the date on which all participating members had voted on the final draft, and that the later reproduction, mailing, and uploading of the decision to the Board's website were purely ministerial functions that did not affect the date on which the Decision and Order issued. With regard to the alleged changes in the duties of unit employees, the Board rejected the Respondent's contentions for the reasons set forth in the Board's August 26, 2011 Decision and Order.

On January 3, March 14, and March 22, 2012, respectively, the Respondent filed its second, third and fourth motions for reconsideration. In its second motion for reconsideration the Respondent argued that the December 30, 2011 Order denying its first motion for reconsideration was improper because it issued without the participation of a quorum, as Chairman Pearce, who was a member of the panel together with then-Members Craig Becker and Brian E. Hayes, was recused. By order dated March 15, 2012, the Board denied the Respondent's second motion for reconsideration, finding that the December 30, 2011 Order was properly issued.

In its third motion for reconsideration, the Respondent argued that the December 30, 2011 order denying its first motion for reconsideration was invalid because the recess appointment of Member Becker, who participated in that decision, had expired prior to that date. While the Board was considering the third motion for reconsideration, the Respondent filed its fourth motion for reconsideration reiterating the argument from its third motion for reconsideration and asserting in the alternative that the March 15 denial of its

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<sup>1</sup> Chairman Mark Gaston Pearce, who was recused and did not participate in the underlying decision, was a member of the panel but did not participate in deciding the merits of the motion for reconsideration.

## SA 16

second motion for reconsideration was improper because the recess appointments of then-Members Griffin and Block, who participated in that decision, were invalid. By order dated March 27, 2012, the Board denied the Respondent's third and fourth motions for reconsideration.

On September 14, 2011, while the first motion for reconsideration was pending, the Board filed its application for enforcement in the United States Court of Appeals for the Third Circuit.<sup>2</sup> Thereafter, the Respondent filed its cross-petitions for review.

At the time of the orders denying the Respondent's second, third and fourth motions for reconsideration, the composition of the Board included three persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

By letter dated November 19, 2015, the United States Court of Appeals for the Third Circuit requested that the parties be prepared to address the following questions at oral argument:

- 1) For purposes of our jurisdiction under section 10(e) of the NLRA, what effect, if any, do pending motions for administrative reconsideration have on the finality of the order for which the NLRB seeks enforcement?
- 2) If the NLRB lacked a proper quorum at the time it filed the administrative record with the Court, why aren't we required, under section 10(e) of the NLRA, to remand the record to the NLRB so that it can take action via a properly constituted quorum?

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<sup>2</sup> This is consistent with Sec. 102.48(d)(3) of the Board's Rules and Regulations, which provides:

The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

## SA 17

- 3) In light of *New Process Steel, L.P. v. NLRB*, 560 US 674 (2010) and *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), would remanding this case so that the NLRB may take action with a properly constituted quorum be the most efficient approach?

On December 2, 2015, in light of *NLRB v. Noel Canning* and the Court's questions referenced above, the Board filed a motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third and fourth motions for reconsideration. On December 4, 2015, the Court granted the Board's motion to remand.<sup>3</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>4</sup>

In its second motion for reconsideration, the Respondent contends that the Board's December 30, 2011 Order was improper because it issued without the participation of a quorum, as Chairman Pearce, who was a member of the panel together with then-Members Craig Becker and Brian E. Hayes, was recused. At footnote 2 of the Board's December 30, 2011 Order, the Board stated:

Chairman Pearce, who is recused and did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of this proceeding.

In *New Process Steel v. NLRB*, \_\_ U.S. \_\_, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

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<sup>3</sup> The Court denied the Board's additional request that the time period of the remand be limited to 30 days. Per Sec. 10(c) of the National Labor Relations Act, the Court retained jurisdiction over this matter.

<sup>4</sup> Chairman Pearce is recused and did not participate in the consideration of this matter.

**SA 18**

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Having duly considered the matter, the Respondent's second motion is denied. We find that our December 30, 2011 Order was properly issued, for the reasons stated therein.

In its third motion for reconsideration, the Respondent argues that the December 30, 2011 order denying its first motion for reconsideration was invalid because the recess appointment of Member Becker, who participated in that decision, had expired prior to that date.

Having duly considered the matter, the Respondent's third motion for reconsideration is denied. As the Court's decision in *Noel Canning* makes clear, a Senate session ends when the Senate adjourns *sine die*. Because the Senate did not adjourn *sine die* before December 30, 2011, Member Becker's term did not end prior to the Board's issuance of the December 30, 2011 order. In fact, his term extended to January 3, 2012, when one Senate session ended and the next session began. *Entergy Mississippi, Inc.*, 361 NLRB No. 89 (2014).

Finally, in view of our above disposition of the Respondent's second and third motions for reconsideration, the Respondent's fourth motion for reconsideration is denied as moot.

Dated, Washington, D.C., December 17, 2015

\_\_\_\_\_  
Philip A. Miscimarra, Member

\_\_\_\_\_  
Kent Y. Hirozawa, Member

\_\_\_\_\_  
Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

**SA 19**

**Letter from Morris Tuchman to the National Labor Relations Board, dated  
December 18, 2015 [SA19-SA20]**

Case: 11-3440 Document: 003112169956 Page: 8 Date Filed: 01/04/2016

**EXHIBIT B**

*Law Office of*  
**MORRIS TUCHMAN**

134 Lexington Avenue, New York, New York 10016 - Telephone (212) 213-8899  
Telefax (212) 213-6308

Morris Tuchman\*  
J. Ari Weiss\*

Correspondence to New York

\*Admitted Connecticut, New York

\_\_\_\_\_  
Long Island Office  
35 Dune Road  
Westhampton Beach, New York 11978

December 18, 2015

Office of Executive Secretary  
National Labor Relations Board  
**By Electronic Mail only**

**Re: New Vista Nursing and Rehabilitation 22-CA-29988**  
**Motion for reconsideration**

May it please the Board:

Please be advised that the undersigned represents the Respondent in the above referenced matter. This motion seeks reconsideration of the Board's order dated December 17, 2015.

As the Board's order reflects, this matter was remanded by the US Court of Appeals for the Third Circuit so that it could determine, with a valid quorum, the three motions for reconsideration that might have involved invalidly appointed members of the NLRB. In joining the motion for a remand, New Vista sought to avoid a thirty day remand because, *inter alia*, it felt that it would move for the recusal of Member Hirozawa. The Board did not, as it normally does, "accept the remand" and seek input from any of the parties before issuing this most recent ruling. In the ruling, the Board denies, on December 17, 2015, all three motions for reconsideration while noting that the Circuit Court granted the joint motion to remand on December 4, 2015. Respondent did not even know that the Board was considering the matter, or when it got it from the Court of Appeals. New Vista now seeks reconsideration of the order and moves for the recusal of Member Hirozawa.

**SA 20**

Case: 11-3440 Document: 003112169956 Page: 9 Date Filed: 01/04/2016

Office of Executive Secretary  
Page Two  
December 18, 2015

The Board's website reflects that Member Hirozawa was part of the charging party's law firm, Gladstein, Reif and McGginis, *for over 20 years*. In April, 2010, the website states, Member Hirozawa became counsel to Board Member Pearce. In 2011, when this case came before the Board for the first time, Member Pearce recused himself from all consideration of it. Presumably, this was because he represented the charging party/petitioning union as a private attorney. However, Member Pearce's law firm was not *actually litigating* this case on behalf of the union. Member Hirozawa's law firm *was*. They litigated this case from its inception in late 2010 and early 2011 until this day. Whatever considerations caused recusal of Member Pearce, including the fact that his current chief counsel, Ellen Dichner, was *also* a partner at the Gladstein firm, should certainly cause the recusal of Member Hirozawa who was 1) chief counsel to Member Pearce when Member Pearce recused himself and 2) a partner in the actual firm litigating this very case. Indeed, Member Hirozawa was a partner in the Gladstein firm until several months before he joined Member Pearce, in 2010, as chief counsel.

Accordingly, the order of December 17, 2015 should be reconsidered, Member Hirozawa recused, and a new decision by a valid quorum issued.

RESPECTFULLY SUBMITTED

/S/ MORRIS TUCHMAN

cc: William Massey, Esq. (By electronic mail)  
Linda Dreeban, Esq.

**SA 21**

**Order Denying Motion for Reconsideration and Motion to Recuse, dated January 5, 2016 [SA21-SA26]**

Case: 11-3440 Document: 003112171543 Page: 3 Date Filed: 01/06/2016

EXHIBIT A

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NEW VISTA NURSING AND  
REHABILITATION, LLC**

**and**

**Case 22-CA-029988**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST, NJ REGION**

**ORDER DENYING MOTION FOR RECONSIDERATION AND  
MOTION TO RECUSE**

On August 26, 2011, the Board issued a Decision and Order in *New Vista Nursing & Rehabilitation, LLC*, 357 NLRB No. 69. On September 9, 2011, the Respondent filed a Motion for Reconsideration, which the Board denied on December 30, 2011. On January 3, March 14, and March 22, 2012, respectively, the Respondent filed its second, third, and fourth motions for reconsideration. By order dated March 15, 2012, the Board denied the Respondent's second motion for reconsideration, and by order dated March 27, 2012, the Board denied the Respondent's third and fourth motions for reconsideration.

On September 14, 2011, while the first motion for reconsideration was pending, the Board filed its application for enforcement in the United States Court of Appeals for the Third Circuit. Thereafter, the Respondent filed its cross-petitions for review.

At the time of the orders denying the Respondent's second, third, and fourth motions for reconsideration, the composition of the Board included three persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*,

## SA 22

Case: 11-3440 Document: 003112171543 Page: 4 Date Filed: 01/06/2016

134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

By letter dated November 19, 2015, the United States Court of Appeals for the Third Circuit requested that the parties be prepared to address the following questions at oral argument:

- 1) For purposes of our jurisdiction under section 10(e) of the NLRA, what effect, if any, do pending motions for administrative reconsideration have on the finality of the order for which the NLRB seeks enforcement?
- 2) If the NLRB lacked a proper quorum at the time it filed the administrative record with the Court, why aren't we required, under section 10(e) of the NLRA, to remand the record to the NLRB so that it can take action via a properly constituted quorum?
- 3) In light of *New Process Steel, L.P. v. NLRB*, 560 US 674 (2010) and *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), would remanding this case so that the NLRB may take action with a properly constituted quorum be the most efficient approach?

On December 2, 2015, in light of *NLRB v. Noel Canning* and the Court's questions referenced above, the Board filed a motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third, and fourth motions for reconsideration. In its answer to the Board's motion, also filed on December 2, the Respondent joined the Board's motion for limited remand, though it disagreed with the Board's additional request that the time period of the remand be limited to 30 days. On December 4, 2015, the Court granted the motion to remand but declined to limit the remand to 30 days.<sup>1</sup>

By order dated December 17, 2015, a panel of the current Board denied the Respondent's second, third, and fourth motions for reconsideration. By letter dated

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<sup>1</sup> Per Sec. 10(e) of the National Labor Relations Act, the Court retained jurisdiction over this matter.



## SA 23

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December 18, 2015, the Respondent filed its fifth motion for reconsideration and a motion to recuse Member Hirozawa.

In support of its fifth motion for reconsideration, the Respondent states that it “did not even know that the Board was considering the matter, or when it got it from the Court of Appeals.” In support of its motion to recuse Member Hirozawa, the Respondent argues, *inter alia*, that because Member Hirozawa was partner in the law firm that represents the charging party in this matter prior to becoming chief counsel to then-Member Pearce in April 2010, he should be recused for that reason and for “whatever considerations caused recusal of Member Pearce.”

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>2</sup>

Having duly considered the matter, the Respondent’s fifth motion for reconsideration is denied. The Respondent’s suggestion that it was not aware that the Board was considering this matter is rejected. The Respondent knew that the Court of Appeals granted the Board’s motion for a limited remand of the administrative record—which the Respondent joined—to allow the current Board to consider the Respondent’s second, third, and fourth motions for reconsideration. By requesting that the remand be limited to 30 days, the Board made clear that it intended to act expeditiously. Moreover, there is no suggestion that the Respondent was prejudiced by the Board’s prompt action in this matter. The Respondent’s motion to recuse Member Hirozawa is also denied. Member Hirozawa’s separate statement regarding the motion to recuse is attached.

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<sup>2</sup> Chairman Pearce is recused and did not participate in the consideration of this matter.

## SA 24

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Dated, Washington, D.C., January 5, 2016

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

### NATIONAL LABOR RELATIONS BOARD

MEMBER HIROZAWA, ruling on motion for recusal.

By letter dated December 18, 2015, the Respondent has moved for my recusal in this matter. The Respondent contends that because for over twenty years I was a member of the law firm that represents the charging party in this matter and because then-Member Pearce recused himself from participation in this matter in 2011, when I was his chief counsel, my recusal is required. The motion is denied for the following reasons.

As an employee of the executive branch of government, I am bound by the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635, and by Executive Order 13490, Ethics Commitments by Executive Branch Personnel (Jan. 21, 2009). Under 5 CFR § 2635.502, “[w]here an employee knows that ... a person with whom he has a covered relationship is or represents a party to [a particular] matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter [absent] authorization from the [agency ethics official].”

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To the extent relevant here, an employee has a “covered relationship” with “[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.” 5 CFR § 2635.502(b)(1)(iv). Executive Order 13490 effectively extends the one-year period of this definition to cover the two years preceding my appointment as a Board member.

The relevant facts are as follows: I was a member of the firm of Gladstein, Reif & Meginniss LLP, counsel for the charging party in this matter, for over twenty years. I withdrew from the firm in April 2010, prior to becoming chief counsel to then-Member Mark Gaston Pearce that month. I served as chief counsel to Member, and subsequently Chairman Pearce continuously until I was sworn in as a Board member in August 2013. During my time with the firm, I had no involvement with this matter or any other matter concerning the Respondent. During my service as chief counsel, I did not participate in the consideration of this matter at any time. My first involvement in the consideration of this matter concerned the Board’s vote to file the December 2, 2015, motion for limited remand of the administrative record to allow the current Board to address the Respondent’s second, third and fourth motions for reconsideration. That was more than five years after I had severed my relationship with my former firm.

In view of the foregoing, I have determined not to recuse myself from participation in this matter. I do not have a “covered relationship” within the meaning of 5 CFR § 2635.502 with any party or representative in this matter. In any event, my participation under the present circumstances would not “cause a

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reasonable person with knowledge of the relevant facts to question [my] impartiality.” 5 CFR § 2635.502(a). Likewise, my participation does not raise any issue under Executive Order 13490 inasmuch as this matter does not concern a former employer or former client as those terms are defined in Sec. 2(i) and (j), respectively, of the Executive Order. See *Regency Heritage Nursing and Rehabilitation Center*, 360 NLRB No. 98 (2014), slip op. at 1 fn. 1.

The motion for recusal is denied.

Dated, Washington, D.C., January 5, 2016

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Kent Y. Hirozawa, Member

**SA 27**

**Order of the Hon. D. Brooks Smith, dated January 21, 2016 [SA27-SA28]**

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT  
January 11, 2016

No. 11-3440

NATIONAL LABOR RELATIONS BOARD,  
Petitioner

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,  
Intervenor

v.

NEW VISTA NURSING AND REHABILITATION,  
Respondent

Nos. 12-1027 & 12-1936

NEW VISTA NURSING AND REHABILITATION, LLC,  
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,  
Intervenor

(NLRB: 22-CA-29988)

Present: SMITH, GREENAWAY, Jr. and VAN ANTWERPEN, Circuit Judges

1. Motion by Respondent/Cross Petitioner New Vista Nursing and Rehabilitation to Supplement the Record/Appendix and for Limited Briefing Schedule on Issues Raised as a Result of Remand;
2. Response by Petitioner/Cross Respondent to Motion by New Vista Nursing and Rehabilitation to Supplement the Record/Appendix and for Limited Briefing Schedule on Issues Raised as a Result of Remand.

**SA 28**

Page 2 (Continued)

Respectfully,  
Clerk/pdb

ORDER

Upon consideration of New Vista's motion to supplement the record/appendix and for limited briefing on issues raised as a result of the remand, and mindful that it is not clear whether the NLRB by its Status Report filed January 6, 2016, was "filing . . . the record" with this Court, thereby divesting itself of jurisdiction over the matter and making this Court's jurisdiction exclusive, *see* 29 U.S.C. § 160(e), it is hereby ORDERED that the motion is granted as follows:

1. The NLRB, on or before January 29, 2016, shall certify and supplement the record to include the proceedings on remand.
2. New Vista shall file a supplemental brief and appendix, if needed, on or before February 22, 2016. The supplemental brief shall be limited to no more than 10 pages.
3. The NLRB shall file a responsive brief on or before March 23, 2016. The responsive brief shall be limited to no more than 10 pages.
4. New Vista may file a reply brief on or before April 7, 2016. The reply brief, if any, shall be limited to no more than 5 pages.
5. No extensions to this briefing schedule shall be granted.
7. The parties are advised that in the event the panel determines that oral argument is warranted, it shall be conducted on Tuesday May 31, 2016 at 1:30 P.M. The parties may not request that this date be changed.

By the Court,

s/D. Brooks Smith  
Circuit Judge

Dated: January 21, 2016  
PDB/cc: All Counsel of Record